INDEX

CITATIONS

Cases—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 852

AMERICAN MANUFACTURING COMPANY OF TEXAS, W. J. GOURLEY, AND W. H. THOMPSON, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals on the present contempt application (R. 58–62) is reported in 132 F. (2d) 740. The decree of the circuit court of appeals in the preceding enforcement proceeding was entered upon consent of the parties (R. 10–14) and without opinion. The decision of the National Labor Relations Board upon which the enforcement proceeding was based is reported in 7 N. L.R. B. 375.

JURISDICTION

The decree of the circuit court of appeals (R. 68–70) was entered on February 15, 1943. The petition for a writ of certiorari was filed on March 25, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the acts held to be in contempt of a consent decree entered in 1938 were related to or similar to the unfair labor practices on which the consent decree was based.

2. Whether the posting of notices by the employer, which disparaged the union and the advantages of membership in it, together with refusal to remove one such notice upon request to do so by two employees, can be regarded as in contempt of a decree enforcing an order of the Board.

3. Whether the court below properly required petitioners, as the condition upon which they could purge themselves of contempt, to post in their plant and distribute to their employees appropriate notices disavowing their prior contemptuous notices and assuring against further violation of the decree.

4. Whether the president of the company and the assistant to the president committed acts in contempt of the decree.

5. Whether lapse of time diminishes the force of a consent decree enforcing an order of the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 22–23.

STATEMENT

On May 23, 1938, the Board, in a proceeding initiated by charges filed by a local of the International Association of Machinists, issued its decision and order (7 N. L. R. B. 375) finding that American Manufacturing Co., Inc.,[1] had interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, sponsored Employees' Federation of the American Manufacturing Company of Texas in violation of Section 8 (2) of the Act, and discharged an employee, Gutoski, in violation of Section 8 (3) of the Act. The Board ordered the company and its officers, agents, successors, and assigns to cease and desist from such unfair labor practices, to offer Gutoski reinstatement with back pay, to refuse to recognize the sponsored union, and to post notices (7 N. L. R. B. 385–386).

[1] In the proceedings before the Board and before the court below, American Manufacturing Company of Texas was incorrectly named American Manufacturing Company, Inc. In their answer to the rule to show cause, the present petitioners agreed to the correction of the designation (R. 20).

Thereafter, on October 18, 1938, the parties stipulated and agreed to the entry of a consent decree enforcing the Board's order with certain modifications (R. 10–13). On December 9, 1938, the court below entered a decree requiring the company and its officers, agents, successors, and assigns to cease and desist from the unfair labor practices found by the Board and to reinstate and pay Gutoski $600 in full settlement of the back pay accrued, and in other respects enforcing the Board's order substantially as entered (R. 10–14).

On November 2, 1942, the Board filed a petition in the court below alleging that the company and its officers and agents had failed and refused to comply with and had disobeyed, resisted, and disregarded paragraph 1 (c) of the court's decree.[2] The petition prayed that the court adjudge American Manufacturing Company of Texas, Gourley, its president, and Thompson, assistant to its president, to be in contempt, and take action to make the decree effective (R. 1–16). On November 11,

[2] Paragraph 1 (c) provided that the company, its officers, agents, successors, and assigns should cease and desist "From in any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act" (R. 11–12).

1942, the court issued a rule directed to the company and the individuals named to show cause why they should not be adjudged in contempt (R. 17–18). Subsequently the company and the two said officers filed their answer to the Board's petition, together with supporting affidavits (R. 19–58), wherein they admitted, in substance, the commission of most of the acts complained of in the petition (R. 21–23), but denied that the acts were committed with the purpose or effect of interfering with, restraining, or coercing their employees (R. 21, 29), averring to the contrary that they had obeyed the decree (R. 19, 25, 30). They further contended in defense that the acts complained of had no connection with or relation or similarity to the acts which brought about the decree (R. 25).

On January 13, 1943, the court handed down its opinion (R. 58–62) holding that on the basis of the following facts, charged in the petition for contempt and admitted in the answer thereto, the company and its two officers were guilty of contempt:[3]

On or about June 1, 1942, shortly after the International Association of Machinists, the union which had filed with the Board the charges leading to the original Board order and decree, initi-

[3] In the following statement the references preceding the semicolon are to the decision of the court (R. 58–62); those following are to the petition for contempt (R. 1–18) and the answer thereto (R. 19–58).

ated a membership campaign, petitioners attached to the time card of each employee the following notice (R. 59, n. 2; 3–4, 21):

TO OUR MEN

> We are proud of the huge job we are attempting to do for our Country.
>
> You men are doing a real job in this effort—you are spending long hours on the job away from your families and favorite relaxations to help us get the job done—your pay is the highest in this section of the country AND YOU ARE NOT FORCED TO PAY A HIGH FEE FOR THE PRIVILEGE OF BEING DICTATED TO BY A BUNCH OF RACKETEERS, WHO SEEM TO HAVE NO INTEREST IN ANYTHING BUT LOAFING AROUND DOING NOTHING AND SUCKING MONEY OUT OF HONEST WORKING MEN.
>
> We believe you are interested in seeing and helping your Country win the war—in doing your part for your Government in this critical time. We believe you are happy working to this end and THAT YOU ARE TOO BUSY DOING SOMETHING WORTH WHILE TO HAVE ANY TIME TO FOOL AROUND WITH ANYONE WHO ATTEMPTS TO GET YOU OFF OF THIS TRACK.
>
> EVERY MINUTE COUNTS.
>
> THE MANAGEMENT.

Thereafter, petitioners caused the letter set forth in the margin,[4] signed by President Gourley, to

[4] To Our Employees:

I am advised that a letter was sent earlier today stressing the big job we have—the big part you are playing in it—and

be posted on some of the company's bulletin boards at its Fort Worth plant (R. 60, n. 3; 4, 15–16, 21).[5] On or about June 15, 1942, petitioners prepared and posted on every bulletin board in the Fort Worth plant notices containing a copy of the check in the amount of $600 paid

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you were asked to be careful to allow nothing to get you "off the track."

Word has just reached us that some of our men misunderstood or "jumped to the conclusion" that the remarks were aimed at Unions, employees' organizations, etc.

Any man in our employ has the right to join with or organize with others for his and their welfare. We are not legally allowed and do not interfere with the rights of our men under the Wagner Act or any other—just as, being a so-called "open shop" we do not require a man to join any Union, company, or otherwise.

I don't see how any men could have got a wrong slant on the letter. The language was strong for it often does get that way when people start thinking or talking of the many strong forces that are at work to "bog down" our efforts to help our Government win this war. Our work is confidential. We are all constantly reminded to stay on the job and keep our mouths closed.

If you don't "stay on the track"—work hard as you can now—before it is too late—you will have a dictator and a merciless one—he will exact fees beyond your human ability to pay—call him a Dictator, Duce, or just plain Racketeer, it is all the same, a racket—The World's biggest racket in all history.

IT IS LATE, BUT NOT TOO LATE—EVERY MINUTE COUNTS.

AMERICAN MANUFACTURING COMPANY OF TEXAS.
(Signed) W. J. GOURLEY (R. 15–16).

[5] About the same time Foreman Lott advised some of the men in his department that it was "not necessary" to belong to any union or organization in order to work for the company, that the plant had operated for a long time without being a closed shop (R. 6–7, 23, 33).

to Gutoski, stating that he had received only this amount in back pay under the court's decree, but that he would have received over $2,000 if he had continued working for the company instead of listening to union officials' "impossible promises";[6] stating that it was not necessary to belong to a union to work for petitioners, or to pay $50 for the privilege of working "until another $50 sucker comes along;" and making further derogatory references to union organizers as "racketeers" (R. 60–61; 5, 22).[7]

After the issuance of the court's opinion finding them in contempt (R. 58–62), petitioners filed a petition for rehearing (R. 63–67), which the court denied on February 12, 1943 (R. 68). On February 15, 1943, the court entered its decree adjudging petitioners in contempt and ordering that they purge themselves by attaching to each employee's time card and posting on all bulletin boards, notices advising the employees (1) that the com-

[6] While Section 2 (b) of the Board's order provided that the company "make whole John J. Gutoski for any loss of pay he has suffered by reason of his discharge," deducting his interim earnings (7 N. L. R. B. 385), this amount was liquidated in the stipulation for the consent decree, which provided in paragraph 2 (b) of the order that the company would "pay to John J. Gutoski and the latter agrees to receive the sum of $600 in full settlement of any and all back pay accrued and due to the said individual by virtue of Section 2 (b) of the aforesaid Order of the Board" (R. 12).

[7] Barney, petitioners' plant superintendent, refused to remove this notice from the company's bulletin board, although requested to do so by two employees (R. 7, 23).

pany, Gourley, its president, and Thompson, assistant to the president, thereby retracted and disavowed the statements made to the employees in the notices posted and distributed in June 1942; (2) that petitioners would not thereafter concern themselves, or molest the employees, or seek to influence them, in the matter of whether they should join, remain members of, or be active in a labor union; that the employees are free to join the International Association of Machinists or any other union; that petitioners would not discriminate against employees or treat them less favorably because they are members of a union; and that such membership or activity would not be considered as a reflection on their patriotism or their loyalty as workers; and (3) that petitioners had instructed their supervisors and foremen to maintain strict neutrality concerning union matters and that they would not molest or seek to influence the employees in regard to union membership or activities (R. 68–70). The decree further ordered that petitioners pay costs and file proof of compliance with the order (R. 69).

Subsequently petitioners moved the court for a stay of enforcement of its decree adjudging them in contempt (R. 71–72), and the Board filed an opposition to such motion (R. 72–74). On February 25, 1943, the court below granted a stay of execution and enforcement of its decree pending the application of petitioners for a writ of certiorari, which was filed on March 25, 1943 (R. 75).

ARGUMENT

1. The first contention urged by petitioners, which rests on an alleged conflict with *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, is untenable. The *Express* case was concerned solely with the breadth of the injunctive order to remedy the limited unfair labor practices found, not with the issue of punishment for violating the clear terms of a consent decree.[8] The supposed conflict with certain language used by this Court in the *Express* case is based on the assumption that the acts which the court below held to be contemptuous "had no connection with, relation to or similarity to the unfair labor practices found in the original case" (Pet. 9). This assumption is wholly incorrect. The original unfair labor practices were acts by which the company restrained its employees from joining the International Association of Machinists (7 N. L. R. B. 383–384). The acts held contemptuous were, as the court below held (R. 61–62), intended to restrain employees from joining that same union. In the original unfair labor practices as well as in the contemptuous acts, the same officers and agents

[8] As the court below pointed out (R. 61), petitioners may not now complain of the breadth of the original decree, having consented to it and permitted it to become final. See *Oriel* v. *Russell*, 278 U. S. 358; *Swift & Co.* v. *United States*, 276 U. S. 311, 327; *United States ex rel. Emanuel* v. *Jaeger*, 117 F. (2d) 483, 487 (C. C. A. 2). Therefore they must abide by its terms and they may not attack it collaterally, as in enforcement proceedings.

of the company, namely, Gourley and Thompson, were the active offenders (R. 2–6, 60, 7 N. L. R. B. 378–383). In both, the interference was accomplished by posting notices on the bulletin boards of the plant indicating "hostility to outside unions" (R. 59–62, 7 N. L. R. B. 381). Similarly, Gourley's gratuitous statements in 1937 that "a person was foolish to pay $3 a month to a union for the privilege of working" (7 N. L. R. B. 380–381) are of a piece with the contemptuous June 1, 1942, notice that the employees "are not forced to pay a high fee for the privilege of being dictated to by a bunch of racketeers" (R. 3) and the notice of June 15 that it was unnecessary to belong to a union to work for the company or to pay $50.00 for the privilege of working (R. 5). The management's disparagement of the remedy afforded Gutoski under the court's decree, conduct found by the court below to be contemptuous (R. 5, 60–61), was closely related to and connected with his discriminatory discharge, which the Board had found to be a violation of Section 8 (3) of the Act (7 N. L. R. B. 381–383). Hence, petitioners' contention that the contemptuous conduct differed materially from that forming the basis for the original decree is contradicted by the record. Moreover, since the contumacious acts "bear some resemblance" to the acts which constituted the original unfair labor practices, no possible conflict exists between the decision below and *National Labor Relations Board* v. *Express Pub. Co., supra,*

in which, at p. 437, this Court agreed that a court decree enforcing a Board order could properly prohibit future acts which "bear some resemblance" to the original unfair labor practices.

It is apparent, therefore, that the decree is not being applied in the instant contempt proceeding so as to be questionable under the *Express Publishing Co.* decision.

2. Petitioners' second contention, based on *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, is that the notices were not themselves coercive and that no background is shown which causes them to become coercive. This contention is, we submit, without merit.

In holding that the notices were on their face contemptuous the court below said (R. 61):

> Indeed, the attempt to explain away the apparent purpose and natural effect of the language used in the notices, which though designedly equivocal is yet plain enough, is the veriest kind of quibbling. * * *

This conclusion is fully supported by the facts.

Petitioners' advice to their employees in the June 1 notice that they were not "forced to pay a high fee for the privilege of being dictated to by a bunch of racketeers, who seem to have no interest in anything but loafing around doing nothing and sucking money out of honest working men," and warning to them not to "fool around with anyone who attempts to get you off

of this track" (of winning the war) (*supra*, p. 6), constituted interference with the right to complete freedom in organizational activities, of a sort which has been uniformly and repeatedly found to be violative of Section 8 (1) of the Act. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78; *National Labor Relations Board* v. *Auburn Foundry, Inc.*, 119 F. (2d) 331, 335 (C. C. A. 7); *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 955 (C. C. A. 2); *National Labor Relations Board* v. *West Texas Utilities Co.*, 119 F. (2d) 683, 684 (C. C. A. 5). It was therefore contempt of the court's decree.

Gourley's letter (*supra*, pp. 6–7), although purportedly seeking to offset the fact that some of the employees "jumped to the conclusion" that the remarks were directed at "Unions, employees' organizations, etc.," contained the additional assurance that "being a so-called 'open shop' we do not require a man to join any Union, company or otherwise." Foreman Lott's statement (*supra*, p. 7) to the same effect, further emphasized this negative aspect of the organizational privileges of the employees. Any doubts as to the company's antiunion intent in the first two notices was completely dispelled by the subsequent notice which cautioned against paying $50 for the privilege of working "until another $50 sucker comes along" (*supra*, p. 8). It is well settled that gratuitous

information to employees from the management that membership in a union is not required, may be viewed as employer interference within the meaning of Section 8 (1),[9] hence likewise violative of the injunction.

The action of the company in posting the notice disparaging the remedy of back pay for Gutoski and referring to the "impossible promises" of the union officials (*supra,* p. 8) was interference of the plainest sort, since it could only indicate to the employees that, notwithstanding the payment the company was obliged to make under the consent decree, Gutoski had lost more than he had gained by his union activities. Thus, the notices presented to the court as violative of its decree were plainly the very interference, restraint and coercion from which the decree required petitioners to cease and desist and compelled the court to find, as it did, that "It is quite clear then that the [petitioners] are in contempt of the decree of this court and that they must be so adjudged" (R. 62).

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[9] *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625, 628 (C. C. A. 2); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309 (C. C. A. 7); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Goshen Rubber & Mfg. Co.*, 110 F. (2d) 432, 434 (C. C. A. 7); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7).

The conduct set forth above is on its face such clear and unambiguous interference, restraint, and coercion in violation of Section 8 (1) of the Act under established law as to distinguish it readily from the isolated "utterances * * * separated from their background" which this Court felt could not be "raised * * * to the stature of coercion" except "by reliance on the surrounding circumstances" in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479.

Moreover, another act of petitioners provides a background which gives additional significance to the notices. Although two employees requested the company's plant superintendent to remove from the bulletin board the notice disparaging Gutoski's back-pay award and pointing out his financial loss as a result of espousing the union's cause, the notice was not removed. This refusal shows that the notices were in fact designed to interfere with the union campaign in the plant. Thus the record shows an integrated and consistent pattern of interference totally lacking in ambiguity, which properly reflected to the court below the very "imponderable subtleties at work" to which this Court referred in the *Virginia Electric & Power* case (*supra*, at p. 479). This Court did not hold in that case that the First Amendment guarantees the right to make spoken and written statements which coerce employees, and coercive

conduct cannot be permitted under the guise of free speech. See *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7). Contentions similar to petitioners' made in recent petitions for certiorari have not been accepted by this Court. See *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624 (C. C. A. 9), certiorari denied, April 19, 1943, No. 758, this Term; *North Electric Mfg. Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818; *Norristown Box Co.* v. *National Labor Relations Board*, 124 F. (2d) 429 (C. C. A. 3), certiorari denied, 316 U. S. 667; *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705.

3. Petitioners' third contention, that the court below lacks power to require petitioners to post and distribute appropriate notices as a condition of purging themselves of contempt, was at no time raised in the court below, although petitioners had full opportunity to raise it in their petition for rehearing (R. 63–67). It therefore does not properly afford a basis for review. Cf. *Helvering* v. *Wood*, 309 U. S. 344.

However, even if this question were properly presented, it is without merit. The power of the court below to prescribe such a method of purgation is settled by numerous decisions of this

Court and of other federal courts.[10] There are no conflicting decisions.

Petitioners contend that since Section 268 of the Judicial Code (28 U. S. C. 385) prescribes the only "punishment" permitted for contempt of a circuit court of appeals decree, the court was without power to require of petitioners any act but the payment of a fine limited to the expenses incurred by the Board in enforcement (Pet. 10, 14, 23). This contention confuses conditions of purgation with "punishment." The procedure normally followed in a proceeding for civil contempt such as this,[11] where the primary objective is to secure a restoration of the *status quo* disrupted by the contempt, is for the court to specify acts of purgation designed to accomplish that end.[12] Punishment is

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[10] See for example *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–442; *Texas & N. O. R. R. Co.* v. *Brotherhood of Ry. Clerks*, 33 F. (2d) 13, 17 (C. C. A. 5), affirmed, 281 U. S. 548; *United States* v. *Craig*, 279 Fed. 900, 907 (S. D. N. Y.), habeas corpus denied, *Craig* v. *Hecht*, 263 U. S. 255; *In re Swan*, 150 U. S. 637, 653; *In re Delgado*, 140 U. S. 586.

[11] See *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725, 727 (C. C. A. 5); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 108 F. (2d) 188, 189 (C. C. A. 9); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 305 (C. C. A.); *Waterman Steamship Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 130 F. (2d) 765, 771 (C. C. A. 1).

[12] See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Texas & N. O. R. R. Co.* v. *Brotherhood of Ry. Clerks*,

normally resorted to only when the contemnor refuses to purge himself. The procedure adopted herein follows the uniform practice of the courts in Labor Board cases, where employers have been ordered to purge themselves by compliance with the decree and by submission of proof thereof.[13]

Moreover, the posting of notices by an employer is an established method of restoring the *status quo* by dissipating the effects of interference, restraint,

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33 F. (2d) 13, 17 (C. C. A. 5), affirmed, 281 U. S. 548; *In re Farkas* (E. D. N. Y.) 204 Fed. 343, 345; cf. Rapalje, *A Treatise on Contempt*, N. Y. 1890, pp. 191, 192. The *Gompers* case does not hold, as petitioners assert (Pet. 7, 23), that the only valid condition of purgation is the payment of money. On the contrary, this Court there recognized that conditions of purgation may include such acts as "to surrender property" or "to make a conveyance" (221 U. S. at 442).

[13] See e. g., *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, No. 20297, August 11, 1942, 11 L. R. R. 28 (C. C. A. 10); *National Labor Relations Board* v. *Rath Packing Co.*, 130 F. (2d) 540, 543 (C. C. A. 8); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 130 F. (2d) 765, 772 (C. C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. (2d) 919, 937 (C. C. A. 2); *National Labor Relations Board* v. *Pearlstone Co.*, 7 L. R. R. 480, 480–481 (C. C. A. 8); *National Labor Relations Board* v. *Schreiber Milling & Grain Co.*, decided March 16, 1943 (C. C. A. 8). In *National Labor Relations Board* v. *Lightner Publishing Co.*, 128 F. (2d) 237, 241 (C. C. A. 7) the employer was instructed to purge himself by complying with the decree, paying costs, and submitting proof thereof in 10 days or be imprisoned. Likewise in *National Labor Relations Board* v. *Tidewater Iron and Steel Co., Inc.*, 2 Labor Cases, 652, 653 (C. C. A. 3) March 12, 1940, the court ordered the respondents to comply with the decree in 30 days or then be subject to fine or imprisonment.

and coercion which violate Section 8 (1) of the Act.[14]

4. Petitioners' fourth contention erroneously assumes that there is no "showing of the extent or manner in which these individuals (Gourley and Thompson) participated in the alleged contemptuous acts" (Pet. 10). Although the petition for the rule to show cause asked that it be directed to Gourley and Thompson, as well as the company (R. 1), and although the rule was so directed (R. 17), petitioners did not question, either in their answer or in the supporting affidavit signed by both these individuals (R. 32), the propriety of holding these individuals, if in fact the acts alleged were contemptuous. This issue was raised for the first time in the petition for rehearing below (R. 6), although full opportunity existed to raise it before. Petitioner may not predicate error on new matter thus raised for the first time in its petition for rehearing. Cf. *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 270 U. S. 84.

Moreover, the record connects both individuals with the contemptuous acts. The original decree runs against the officers and agents of the company, as well as against the company itself (R.

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[14] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 438; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 263, 268; cf. *National Labor Relations Board* v. *Ford Motor Co.*, 119 F. (2d) 326, 328, note 2, 331 (C. C. A. 5).

11).[15] The following facts were alleged and admitted: Gourley and Thompson were president of the company and assistant to the president, respectively (R. 2, 20); both men had knowledge of the contents of the decree (R. 2–3, 20); "Respondents" (petitioners herein) caused the notice of June 1, 1942, to be attached to the time cards of the employees (R. 3, 21); Gourley signed the letter (Ex. 2, R. 15, 16) the posting of which was one act of contempt (R. 15, 21); Thompson refused to permit the Board to see a copy of the notice regarding the Gutoski back pay award and on a later occasion informed the Board that no copies of that notice were any longer in existence (R. 5–6, 22). Thus both individuals are shown to have participated in or to have been connected with the contemptuous acts.

5. A final contention, in reliance on *National Labor Relations Board* v. *Pacific Greyhound Lines,* 106 F. (2d) 867 (C. C. A. 9), is that the consent decree lost some of its effectiveness through the passage of time. However, the cited

[15] Corporate officers and agents have frequently been held in contempt of similar decrees. See *National Labor Relations Board* v. *Lightner Publishing Co.*, 128 F. (2d) 237, 241 (C. C. A. 7); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 304 (C. C. A. 2); *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. (2d) 187, 188, 189 (C. C. A. 7); *National Labor Relations Board* v. *Pearlstone Co.*, 7 L. R. R. Man. 588, 589 (C. C. A. 8), 3 Labor Cases, Par. 60, 225; *National Labor Relations Board* v. *Tidewater Iron and Steel Co.*, 2 Labor Cases, 652, 653 (C. C. A. 3). See also *Wilson* v. *United States*, 221 U. S. 361, 376.

case was a decision on particular facts, among which the passage of time was but a single factor; in fact, the opinion expressly states (*ibid.* at p. 869) that "the time element here is not the controlling factor * * *."[16]

CONCLUSION

The decision below, finding petitioners in contempt of the court's decree, is correct, and presents no conflict in the decisions nor any questions warranting review. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
RUTH WEYAND,
HELEN F. HUMPHREY,
Attorneys,
National Labor Relations Board.

APRIL 1943.

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[16] See discussion of the case in *The Scope of NLRB Cease and Desist Orders: Contempt Proceedings Against the Employer*, 53 Harv. L. Rev. 472, 478.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in

any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

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